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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1965

No. 296

THE BANKERS BOND COMPANY, INC.,
ELINORE SEDLEY, - - - - - Petitioners,

versus

ALL STATES INVESTORS, INC.,
JAMES E. DUNNE, II,
MOSES MASTER, Administrator of the Estate
of Charles D. Dunne, Deceased, - Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

GAVIN H. COCHRAN,
712-725 Kentucky Home Life Bldg.,
Louisville, Kentucky,

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RESPONDENTS' STATEMENT OF THE CASE.

The pertinent facts of this case are stated in the opinion of the Court of Appeals for the Sixth Circuit (Petitioners' Appendix, pp. 88-99). While respondent accepts most of petitioners' statement of the case, some parts are clearly erroneous and unsupported by the record.

Contrary to counsel's statement (Petition, p. 9), the settlement agreement was substantially performed

by plaintiff by tender of the assignment, release and indemnity and by doing the numerous other acts required by the agreement.

Counsel's contentions that former counsel for defendants attempted, in effect, to pressure his clients to agree to a modification of the settlement agreement are not supported by any reasonable interpretation of the record. Petitioners were present at and participated in the negotiations of which they now complain; and, as pointed out in the trial judge's opinion, quoted by the Court of Appeals, petitioners' handling of the case since October 1963, represents in effect a belated attempt to deny facts previously stipulated or admitted and to repudiate acts of former counsel who had served them long, faithfully and efficiently for five years (Petitioners' Appendix, pp. 65-67, 95).

The statement that the bonds were worth $105,000.00 until February 21, 1963 (Petition, p. 15) is inaccurate and contrary to the express stipulation of the parties in a pre-trial order. (See Judge Wilson's opinion of October 4, 1963, Petitioners' Appendix, p. 52.)

REASONS FOR DENYING THE WRIT.

Petitioners Fail to Cite Any Grounds for Review Provided for in Rule 19 or Otherwise Recognized by This Court.

The judgment of the Court of Appeals for the Sixth Circuit, of which review is now sought, has no substantial bearing on what have been recognized by this Court as proper subjects for review, such as matters affecting public policy or the public interest,

problems of recurring importance or new, novel or important questions of federal law. Petitioners' allegations that due process of law has been denied them and that there are conflicts between circuits as to some issues are completely without merit. What is involved in this case is exclusively the enforcement of a settlement agreement and the adjudication of the individual rights of the parties thereto.

The questions numbered 1, 2, 3, 5 and 11 relate purely and simply to well established matters of local law which were fully discussed in the opinion of the Court of Appeals (Petitioners' Appendix, pp. 87-99), principally, (1) the rule that settlement agreements will be enforced where there has been substantial performance, (2) the rule that the Court retains jurisdiction pending the closing of such an agreement and has the authority to adjudicate issues presented in its enforcement and (3) recognition that the judgment of the District Court enforcing the settlement agreement is neither a judgment by confession nor a judgment entered into before an action is instituted and is not, therefore, a judgment barred by Section 372.140 of the Kentucky Revised Statutes.

Question number 4 raises only factual issues and is not reviewable. That former counsel ever negotiated with plaintiff contrary to the intentions of petitioners has never been established, nor could it ever be established in view of the fact that petitioners were present and participated in such negotiations.

In questions number 6 and 9 counsel is apparently referring to order of the District Court of January 22,

1959 holding the bonds invalid. If this is so, these questions are clearly not applicable to the subject matter of this appeal, which relates only to the propriety and procedure of the judgment enforcing the settlement agreement. Defendants, instead of proceeding with the second trial, in which event they could have appealed from an adverse judgment, elected to enter into the settlement agreement, failed to perform the same and then appealed an adverse judgment upon their default.

Question number 7 is obscure to say the least. Certainly the Supreme Court will not direct the Court of Appeals to reconsider its denial of petitioners' petition for rehearing. Moreover, if the record below shows any "admission" by respondents' officers that they had not seen the bonds since 1959, petitioners neither raised this matter below nor called the alleged portions of the record to the attention of the Court of Appeals. For these reasons this matter is not now reviewable, even assuming that the alleged "admission" is of any importance at all.

Question number 8 alleges a denial of due process of law on the apparent ground that petitioners were not allowed to file a third-party complaint against their former counsel for allegedly acting beyond the scope of his authority. What petitioners are really complaining of, however, is the District Court's refusal to allow them to repudiate, after an unfavorable decision, what they themselves had participated in. The recent case of *L. W. Holt* v. *Commonwealth of Virginia*, —— U. S. ——, 85 Sup. Ct. 1375 (1965), is cited

in support of petitioners' contentions without any further clarifying statement. This case involved the summary imposition of a fine for contempt under very peculiar circumstances and has no possible connection with the case now before the Court. Another case cited, *Willner* v. *Committee on Character and Fitness*, 376 U. S. 96 (1963) (erroneously cited by petitioners as *Willner* v. *United States*), involved denial of admission to practice of a person who although he had successfully passed the bar examination, was not admitted on "character grounds and was not afforded a hearing." This Court held that the attorney-applicant was denied due process of law when he was refused admission without a hearing. This is a far cry from a client trying to impeach his own attorney after five years of faithful and efficient service. It cannot be overlooked that if petitioners had accepted the advice and judgment of their former attorney on these purely legal matters they would not be in the unfortunate position they are in today.

Question number 10, as it is posed, and the concluding statement therein are not clear as to their exact relationship to this appeal. Counsel is apparently raising the issue of whether or not the judgment entered by the District Court should have been rendered in conformity with Rule 56(e) of the Federal Rules of Civil Procedure relating to summary judgment. This problem was fully discussed by the Court of Appeals; and, as that Court pointed out, Rule 56 is not applicable to the situation in this case, since the judgment rendered by the District Court was in the nature

of a judgment by consent (Petitioners' Appendix, pp. 98, 99). The parties had specificially stipulated that the District Court should retain jurisdiction to enter judgment for plaintiff in the event defendants defaulted. Thus the procedure was controlled by the parties themselves. No authority is cited to the effect that the judgment of the District Court is not in fact a consent judgment.

In *S. J. Groves & Sons Company* v. *Ohio Turnpike Commission,* 315 F. 2d 235 (6th Cir. 1963), cited by petitioners as being pertinent to Question 10, the Court of Appeals for the Sixth Circuit reversed a summary judgment because of the "complex facts and issues involved" and because different inferences might be drawn from those facts. They were indeed complex and involved a contract for the construction of a superhighway. Although in the present case the term "summary judgment" was originally applied because of the very definite provisions for Court action contained in the stipulation by the parties quoted in the Court's opinion, it was not a true summary judgment as envisioned by the Federal Rules of Civil Procedure. Moreover, even if we assume that it was, there was no dispute as to the extent of respondents' and petitioners' performance, as to the value of the bonds (until later raised after an adverse decision) or as to the innocence of both parties vis-a-vis the clerk's inability to find the bonds. In short, it was not at all the complex factual situation described by the Sixth Circuit in the *Ohio Turnpike* case, *supra.*

The allegedly conflicting case from the Fourth Circuit, *United States* v. *Ball*, 326 F. 2d 898 (4th Cir. 1964), also cited by petitioners as being pertinent to question 10, involved the reversal of a summary judgment against a taxpayer obtained pursuant to provisions of the Internal Revenue Code. There are simply no points of comparison or analysis between it and the *Ohio Turnpike* case. Moreover, since the granting of a summary judgment must remain within the sound discretion of the trial court, it is virtually impossible to speak in terms of a conflict between circuits in this context. However, the plain fact is that the Court is not here concerned with a summary judgment but with a consent judgment.

To summarize, instead of accepting a sure settlement of $105,000, petitioners took an all-or-nothing, shoot-the-works approach, even though the odds were clearly against them. It was a major and expensive error in judgment, but by no stretch of the imagination were any serious federal questions involved. Even in the petition for certiorari petitioners continue to retry the case (Petition, p. 19) and heap abuse on their former counsel. The reference to his "pressing them into a new settlement agreement" (Petition, p. 13) is somewhat ironic, since the proffered advice was very sound in the light of the District and Circuit Court's subsequent decisions. In fact, there is no conflict between this decision of the Sixth Circuit and decisions of its own or any other circuit. No new, novel or important question of federal law is raised. No conflict with this Court's decisions is involved. In short, the

district court pursuant to stipulation of the parties and with full knowledge of all the facts enforced the settlement agreement and was affirmed in every respect by the Appellate Court.

CONCLUSION.

For the reasons set forth above, the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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REPLY BRIEF OF RESPONDENTS JAMES E. DUNNE, II, AND MOSES MASTERS, ADMINISTRATOR.

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